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No. 01-1420

FILED
AUG 2 2002
OFFICE OF THE CLERK

In The
Supreme Court of the United States

WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES, ET AL.,

Petitioners,

v.

GUARDIANSHIP ESTATE OF DANNY KEFFELER BY WANDA PIERCE, GUARDIAN, AND OTHER PERSONS SIMILARLY SITUATED,

Respondents.

On Writ Of Certiorari To The Washington Supreme Court

BRIEF OF *AMICI CURIAE*, COUNTIES OF THE STATE OF CALIFORNIA: LOS ANGELES, SAN BERNARDINO, SANTA CLARA, CONTRA COSTA, ALAMEDA, MODOC, NAPA, NEVADA, RIVERSIDE, SAN DIEGO, TULARE, AND THE CALIFORNIA STATE ASSOCIATION OF COUNTIES, IN SUPPORT OF PETITIONERS

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OPINION BELOW

In *Guardianship Estate of Danny Keffeler v. Washington State Department of Social and Health Services, et al.*, 145 Wash. 2d 1 (2001), the Washington Supreme Court ignored the Social Security Administration's ("Administration") interpretation of section 405(j) of the Social Security Act ("Act") and the regulations promulgated thereunder. The *Keffeler* decision effectively invalidated section 405(j) and the regulations by holding that the state child welfare agency could not apply social security benefits to the costs of current care of children in foster care. This broad scope has nationwide significance. If allowed to stand, this ruling endangers the statutory provisions for the care of dependent children and the operation of state and local child welfare agencies throughout the country.

Specifically, the *Keffeler* court ruled that the State of Washington violated the Act's "anti-alienation" provision which is designed to protect benefits of needy persons from being used by creditors to satisfy past debts. Section 407(a) provides that social security benefits shall not be subject to "execution, levy, attachment, garnishment, *or other legal process*, or to the operation of any bankruptcy or insolvency law." [Emphasis added.] The *Keffeler* court erroneously held that the term "other legal process" included the statutory functions of the *amici curiae*: i.e., applying for status as "representative payee" for foster children and then receiving and applying social security benefits to the cost of county-administered foster care provided for them. As will be shown in detail below, the reasoning of the *Keffeler* decision is flawed in that it interprets section 407(a) without giving proper deference

to section 405(j) and the intent expressed in the regulations promulgated by the Administration.

INTEREST OF THE *AMICI CURIAE*

The *amici curiae* are eleven counties of the State of California, and the California State Association of Counties ("CSAC"), a non-profit organization whose membership includes all 58 counties in California.[1] All together, these counties provide foster care services for more than 60,000 abused and neglected children.

As a result of the *Keffeler* ruling, current and former foster children in at least three of the *amici* counties filed similar class actions against the local child welfare agencies and others are threatened, in California and other states. In February 2002, a coalition of four law firms filed separate actions against the counties of Los Angeles, San Bernardino, and Santa Clara, California, in state court.

[1] CSAC sponsors a Litigation Coordination Program which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of County Counsels throughout California. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all 58 counties of California.

CSAC is not a political subdivision of California but has obtained consent of all parties to join in this *amicus* brief, pursuant to Rules of the Supreme Court of the United States, Rule 37.3.

Counsel for a party did not author this brief in whole or in part. No person or entity, other that the *amici curiae* and their counsel, have made a monetary contribution to the preparation and submission of this brief.

Each county removed the actions to federal district court based upon the federal questions alleged. These class actions seek reimbursement of all social security benefits paid to the counties as representative payees for foster children since 1976 (in the actions against San Bernardino and Santa Clara Counties) or 1978 (in the action against Los Angeles County). A fourth California county has been defending a similar class action suit since 1995.[2] Thus, at least four class actions are currently pending in the federal district courts of California which allege that the *amici* counties' use of social security benefits toward the current costs of foster care is illegal and seek repayment of millions of dollars of public funds expended for care of dependent children.

California, unlike the state of Washington, delegates the administration of social services, including foster care, to its counties. While the counties of California follow the same guidelines as other state social services agencies, their status as counties exposes them to greater potential liability. In contrast to states which are not "persons" under 42 U.S.C. § 1983, local governments are subject to suit if they allegedly deprive persons of rights conferred by federal statutes. *Monell v. Dept. of Social Services* 436 U.S. 658, 690-691 (1978). In fact, three of the pending actions against California counties include claims under Section 1983. Further, individual county employees who can be held responsible for a specific deprivation may be sued personally and held liable for punitive damages. *Watkins v. City of Oakland* 145 F.3d 1087, 1093 (9th Cir. 1998).

[2] This action is filed against Contra Costa County.

Thus, each of the 58 counties of California has a strong interest in this Court's interpretation of the applicable provisions of the Social Security Act which authorizes them to act as representative payees for foster children. The *amici* counties urge the Court to defer to the Administration's interpretation of the Act and to continue to allow them to serve as representative payees for the benefit of eligible foster children and to use the children's social security benefits for their current care.

SUMMARY OF ARGUMENT

Section 405(j) and the regulations allow local child welfare agencies to act as representative payees for Social Security benefits of dependent foster children and to use those benefits for the costs of their current care. *Amici curiae* request that the Court reverse the *Keffeler* decision because local child welfare agencies do not violate the anti-alienation provision of section 407(a).

ARGUMENT

I. THE SOCIAL SECURITY ACT IS THE LEGISLATIVE SOURCE FOR MOST CHILD WELFARE FUNDS.

Without absolving parents of their legal responsibility for the cost of care and maintenance of their children, the federal government supports abused and neglected children by providing shelter, care and services to the children and their parents or caretakers, if appropriate. Such guidelines are set forth in Title IV of the Act which allocates

federal child welfare funding to qualifying states. 42 U.S.C. § 672 *et seq*.

The costs of foster care are shared by the federal and local governments. The portion of the costs borne by each entity varies depending upon whether the child in foster care was eligible for federal Aid to Families with Dependent Children – Foster Care ("AFDC-FC") at the time the child was removed from the parents' home. 42 U.S.C. § 672(a). Generally, the federal government pays at least 50 percent of these costs. Since the majority of foster care funds are federal, federal regulations govern the way states and counties expend these funds and furnish foster care services.

A. LOCAL SOCIAL SERVICE AGENCIES ARE AUTHORIZED REPRESENTATIVE PAYEES FOR SOCIAL SECURITY BENEFITS.

Some children in foster care are also eligible for social security benefits, either because a parent is disabled or has died[3] or because the child is disabled and lacks significant resources for the child's special needs.[4] The Act and regulations thereunder specifically authorize the payment of benefits for children under the age of 18 to a representative

[3] These benefits are paid under Title II of the Social Security Act, the Old-Age and Survivor's and Disability Insurance Benefits program and will be referred to herein as "survivor's benefits." 42 U.S.C. § 401 *et seq*.

[4] These benefits are paid under Title XVI of the Social Security Act, the Supplemental Security Income ("SSI") program. 42 U.S.C. § 1381 *et seq*.

payee. 42 U.S.C. § 405(j); 20 C.F.R. §§ 404.2010(b), 416.610(b). The Administration approves and supervises all representative payees to ensure that they are following applicable regulations and acting in the best interest of the beneficiaries. 20 C.F.R. §§ 404.2001, 416.601. For dependent children, a state or county child welfare agency may be appointed as representative payee. 20 C.F.R. §§ 404.2021(b)(7), 416.621(b)(7). Generally, such an agency will be appointed as representative payee only if no other suitable individual is identified to serve in that capacity. 20 C.F.R. §§ 404.2021(b), 416.621(b).

B. REPRESENTATIVE PAYEES MUST USE BENEFITS FOR THE CARE OF THE CHILD.

A representative payee must use the payments for the "use and benefit of the beneficiary." 20 C.F.R. §§ 404.2035(a), 416.635(a). Regulations authorize a representative payee to pay for the beneficiary's "current maintenance," including the costs of "food, shelter, clothing, medical care and personal comfort items." 20 C.F.R. §§ 404.2040(a), 416.640(a). The cost of institutionalized care, such as foster care, is an authorized expense.[5] 20 C.F.R. §§ 404.2040(b), 416.640(b). If the monthly social security benefits exceed the amount needed for current maintenance, the regulations

[5] Under California law, foster care is designed to provide 24-hour out-of-home care for dependent children, including food, clothing, shelter, school supplies and personal incidentals. Cal. Welf. & Inst. Code, §§ 11400(f), 11460(b). Thus, the care and services provided in foster care are the same as authorized under the representative payee regulations.

direct the representative payee to conserve or invest these funds and hold them in trust for the child. 20 C.F.R. §§ 404.2045(a), 416.645(a). However, there is a cap of $2,000 on funds that may be held in trust if they are not used for the current maintenance of the beneficiary. 42 U.S.C. §§ 1382(a)(1)(B)(ii), 1382(a)(3)(B); 20 C.F.R. § 416.1205.

The Administration monitors representative payees to ensure compliance with statutory and regulatory obligations, including periodic review of state agencies that serve as representative payees. 42 U.S.C. §§ 405(j)(3)(A)-(B), 1383(a)(2)(C)(i). For example, the Administration's Office of Inspector General has conducted at least 19 audits of local social service agencies' actions as representative payee since 1997. Accordingly, the *amici curiae* have complied with the Act and their programs have been approved of by the Administration.

The *Keffeler* court did not address the fact that the Administration approves of the use of benefits for the costs of current foster care by child welfare agencies serving as representative payees. The Washington Department of Social and Health Services ("DSHS") acted with the approval of the Administration when it was appointed by the Commissioner as representative payee. *Keffeler*, 145 Wn.2d at 10-11. Nevertheless, the *Keffeler* court concluded that the child welfare agency did not act in the best interests of the beneficiaries when it used benefits to pay for the costs of food, clothing, shelter, medical care, and personal items of children in foster care. *Id.* p. at 26. This conclusion is contrary to the Administration's determination that use of benefits for current maintenance in foster care is an authorized expense.

II. WHEN THE ANTI-ALIENATION PROVISION OF THE ACT IS READ IN CONJUNCTION WITH THE REPRESENTATIVE PAYEE PROVISIONS, IT IS CLEAR THAT THE COUNTIES CAN USE BENEFITS TOWARD THE COST OF PROVIDING FOSTER CARE.

Under the Act, a beneficiary's creditors are prohibited from being appointed as representative payee. 42 U.S.C. §§ 405(j)(2)(C)(i)(III), 1383(a)(2)(B)(iii)(III). The Act's anti-alienation provision prohibits creditors from attaching or encumbering social security benefits. It states:

> The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

42 U.S.C. § 407(a); See also 42 U.S.C. § 1383(d)(1) [incorporating Section 407 for purposes of Title XVI's SSI program.]. Read together these two sections of the Act aim to ensure that social security payments are used for the current care of the beneficiaries and not to satisfy past debts. Since the Act expressly allows child welfare agencies to be representative payees and as such to apply social security payments to the child's current maintenance, the Administration clearly does not construe these agencies as creditors within the meaning of these provisions.

In reviewing an agency's construction of a statute that it administers, a court must consider the intent of Congress. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 842-43 (1984). If the intent of

Congress is clear from the statute, that is the end of the inquiry. *Ibid.* If, however, the court determines that Congress has not directly addressed in the statute the precise question at issue, the court cannot simply impose its own construction on the statute. *Ibid.* In that instance, the court must evaluate whether the agency's interpretation of the statute is based on a permissible construction of the statute. *Ibid.* Furthermore, "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Chevron*, 467 U.S. at 843-44. An agency's interpretation of the statute should be respected unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at p. 844.

Applying these principles to the instant case, the anti-alienation provision expresses a general principle that benefits for current maintenance of needy people should not be used to pay for past debts. Congress thereby did not address the situation of representative payees of dependent children, effectively delegating to the Administration the responsibility of constructing and implementing the representative payee guidelines. In its regulations, the Administration expressly allows a county child welfare agency to be appointed representative payee and to use the benefits for the current maintenance of the children. 20 C.F.R. §§ 404.2021(b)(7), 416.621(b)(7). Therefore the Administration clearly does not consider local child welfare agencies to be creditors because the benefits are not used to satisfy past debts. Rather, they are used for current maintenance. Thus, the *amici* counties do not stand in a creditor-debtor relationship with foster children when the counties use the benefits for providing for the current needs of foster children.

III. COURTS HAVE CONCLUDED THAT THE USE OF SOCIAL SECURITY BENEFITS BY REPRESENTATIVE PAYEES IS NOT "OTHER LEGAL PROCESS" AND THEREFORE DOES NOT VIOLATE SECTION 407(a).

The *Keffeler* court relied on a series of cases which prohibit social service agencies from taking social security payments from beneficiaries and using them to finance institutionalized care for the beneficiaries. See, for example, *Bennett v. Arkansas* 485 U.S. 395 (1988) [Arkansas statute permitting seizure of prisoners' benefits and use for prisoners' care and maintenance violated Section 407(a).]; *Crawford v. Gould* 56 F.3d 1162 (9th Cir. 1995) [Automatic withdrawal of social security benefits from the accounts of psychiatric patients was considered "other legal process" and, therefore, violated section 407(a).]; *Brinkman v. Rahm* 878 F.2d 263 (9th Cir. 1989) [Washington procedure withdrawing funds from psychiatric patients' account to reimburse the state for the costs of care of the patients violated 407(a).].

Importantly, in each of these cases, the agency that sought the payments **did not** act as representative payee of the benefits and was not authorized to act as such. The Alaska Supreme Court noted this critical distinction in *C.G.A. v. State of Alaska* 824 P.2d 1364 (1992). In approving the state's use of a minor's social security benefits to pay for the child's care in juvenile hall, the court noted:

> Social security regulations allow a state to become a representative payee. [citations omitted.] The regulations also allow representative payees to use some or all of the benefits to pay for appropriate institutional care. [footnote omitted.]

> The regulations do not require that the representative payee consult with the beneficiary before spending the funds. *Thus, so long as the state agency performs its duties as representative payee and spends the funds only on authorized expenses, it would not violate the prohibition on attachment found in section 407(a)'s ban on attachment.*

Id. at p. 1369, emphasis added.

In other cases considering a representative payee's use of payments, two circuit courts determined that use of funds for the care of the beneficiary was appropriate and did not violate Section 407(a). In *Mason v. Sybinski* 280 F.3d 788 (7th Cir. 2002), an Indiana social service agency, as representative payee, used benefits for the costs of hospitalization of mentally impaired adults. The Seventh Circuit concluded that the representative payee procedures were not "other legal process" under Section 407(a). "The Social Security Act and regulations . . . permit – in fact, encourage – state institutions to act as representative payees and, more pertinently, when acting as payees, to apply recipient's benefits to the cost of their care and maintenance at a state institution where they reside." *Id.* at p. 793. Similarly, in *King v. Schafer* 940 F.2d 1182 (8th Cir. 1991), a Missouri social service agency acted as representative payee for psychiatric patients. The Eighth Circuit determined that Missouri's use of social security benefits for the cost of psychiatric hospitalization is not "other legal process" and does not violate the anti-alienation provision of the Act. "Section 407(a) was not intended to outlaw a procedure expressly authorized by the Social Security Administration's own regulations." *Id.* at p. 1185.

Based upon the cases decided throughout the country to date, an important distinction emerges. In situations in which the social service agency acts as representative payee and follows the stringent obligations set forth by the Administration to maintain that status, the use of social security benefits to pay for the recipient's care is appropriate and does not violate the anti-alienation clause of the Act. All cases holding the opposite did not involve a duly appointed representative payee. The Washington Supreme Court's ruling in this matter conflicts with these decisions and effectively prohibits a child welfare agency from acting as a representative payee for the child. The *Keffeler* court's interpretation of the Act and its regulations is inconsistent with prior court decisions and the Administration's interpretation of its own regulations.

IV. CALIFORNIA COUNTIES, WHEN SERVING AS REPRESENTATIVE PAYEES, COMPLY WITH STATE AND FEDERAL LAWS THAT REQUIRE COUNTIES TO OBTAIN ALL AVAILABLE SOURCES OF INCOME FOR CHILDREN IN FOSTER CARE.

A county child welfare agency acts as a child's parent when it takes custody of an abused or neglected child. *In re Danielle W.* 207 Cal.App.3d 1227, 1235 (1989). In fact, California specifically seeks to provide dependent children with the custody, care and discipline equivalent to what should have been offered by the child's parents. Cal. Welf. & Inst. Code, § 16000. If a parent is financially able, federal law requires a parent to pay the reasonable costs of support of the child whether the child is in their custody, the custody of another parent or the custody of a county child welfare agency. In fact, the Act itself requires states

to seek financial support from the parents of children in foster care in order to qualify for federal child welfare funding. 42 U.S.C. § 654. To be eligible for AFDC-FC, a child must assign any rights to parental support to the county. 42 U.S.C. §§ 608(a)(3), 654, 671(a)(17).

California law also requires that parents contribute to the costs of care of their children. The California Supreme Court approves of counties seeking reimbursement from parents for support and maintenance of a child while in a foster home. *County of San Mateo v. Dell* 46 Cal.3d 1236 (1988). "[W]here a preexisting legal obligation of support of the dependent is established, there is no constitutional impediment to the state seeking reimbursement from the responsible family members of the reasonable costs of support and maintenance of such dependent. . . . " *Id.* at p. 1252; See also Cal. Welf. & Inst. Code, § 11477. Thus, based upon federal mandates, California law confirms county child welfare agencies' responsibility to seek reimbursement of foster care costs from parents, even if the parent is receiving public aid.

The procedures for using a child's social security benefits to support the child while in foster care is an analogous situation. Survivor's benefits are intended to help support a child if the child's parent has died. SSI payments are available to help support children who are financially needy and whose parents are disabled or who are disabled themselves. In short, both types of social security benefits are designed to provide for a child's support if its parents are unable to do so. Both federal and state guidelines require that counties obtain all available sources of income for the child in order for the child to be eligible to receive foster care funding through AFDC-FC. 42 U.S.C. § 671(a)(17); 45 C.F.R. § 233.20(a)(3)(ix); Cal.

Dept. Soc. Srvs. Manual of Policies and Procedures 44-103.1. Thus, the counties' procedures for acting as representative payees of foster children's benefits and using such benefits for the child's support are consistent with the counties' obligations to seek contribution from the parents for the costs of foster care and are authorized by the Administration's regulations.

V. THE *KEFFELER* RULING CREATES A DISPARITY BETWEEN CHILDREN ELIGIBLE FOR FEDERAL AFDC-FC UNDER TITLE IV-E AND THOSE ELIGIBLE FOR NON-FEDERAL AFDC-FC.

Following changes in the child welfare funding statutes in 1980, issues arose regarding the payment of benefits to children who may be eligible for both foster care funding and social security benefits. To resolve these questions, the U.S. Department of Health and Human Services Administration on Children and Families specifically opined that a child may receive benefits from both programs concurrently. U.S. Dept. Health & Human Srvs. Admin. for Children and Families Policy Announcement "Concurrent Eligibility for SSI and Title IV-E Foster Care Payments" ACYF-PA-94-02 (Feb. 4, 1994). Pursuant to SSI regulations, federal foster care payments under Title IV-E are deemed income to the minor and result in a dollar-for-dollar deduction in the SSI payment for the child. Soc. Sec. Admin. Program Operations Manual SI 00830.410 and SI 00830.170; U.S. Dept. of Health & Human Services Admin. for Children, Youth and Families, 8.4D. Such a federal policy contemplating the use and interaction of these two sources of funding evidences Congress' intention not to provide dual incomes to a child. Instead, these funding

programs for needy children were developed to compliment each other and ensure a child receives sufficient income for his or her current needs.

However, if *Keffeler* is upheld there will be a disparity in treatment between a child eligible for federal AFDC-FC under Title IV-E and a child eligible for non-federal AFDC-FC.[6] Under the Washington Supreme Court's ruling in *Keffeler*, a child eligible for non-federal AFDC-FC will receive full benefits under both the non-federal foster care system and the social security system, as opposed to a child eligible for federal AFDC-FC whose SSI payment will be reduced by the amount of the federal AFDC-FC payment.

In contrast, under the California Department of Social Services' current policy, children receiving federal and non-federal AFDC-FC benefits are treated the same. Under California policy, for a child eligible for non-federal AFDC-FC benefits, the SSI payment is treated as income and the state foster care benefit payment is reduced accordingly. Any remaining non-federal AFDC-FC benefits are used to supplement the cost of foster care if the SSI payments are less than the state foster care benefit. Cal. Dept. of Soc. Svcs. All County Letter No. 94-82 (Sept. 30, 1994). This results in equal income to a child receiving SSI under either federal or non-federal AFDC-FC programs.

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[6] If children do not meet the federal AFDC-FC eligibility requirements set forth in the Act, they may still be eligible for child welfare funding through the state and counties of California. State and local welfare agencies refer to such funding as "non-federal AFDC-FC."

VI. CHILDREN ARE AT RISK OF LOSING CRITICAL STATE AND FEDERAL BENEFITS IF THE SOCIAL SECURITY BENEFITS ARE ALLOWED TO ACCRUE.

The court in *Keffeler* concluded that Washington did not act in the best interests of the beneficiaries by using benefits for the care and maintenance of foster children. *Keffeler*, 145 Wn.2d at 24. The court held that the benefits "could be used or conserved for other special needs of the child." *Ibid.* This analysis is based on the faulty assumption that the benefits can be "conserved" or invested for "special needs" even though the Act and the regulations make no mention of using the benefits for purposes other than for current maintenance.

To ensure that federal funds are provided to the most needy individuals, many public assistance programs include limitations upon the amount of money recipients can accumulate while receiving the benefits. For example, an SSI beneficiary may not have property worth over $2,000. 42 U.S.C. §§ 1382(a)(1)(B)(ii), 1382(a)(3)(B); 20 C.F.R. § 416.1205. Thus, if $2,000 in benefits accumulates in a foster child's account, the SSI benefits will be suspended and eventually terminated. 20 C.F.R. §§ 416.1324, 416.1335.[7] Termination of SSI benefits has both immediate and long-term adverse effects upon a foster child. While in foster care, the child will no longer receive the extra items

[7] Included in a representative payee's duties is the requirement a representative payee notify the Administration "of any event that will affect the amount of benefits the beneficiary receives or the right of the beneficiary to receive benefits." 20 C.F.R. § 416.635(b).

foster care, the child will no longer receive the extra items that a representative payee may purchase under the federal regulations. See, for example, 20 C.F.R. § 416.640. In the future, when a foster child whose SSI benefits have been terminated while in foster care is reunified with its parents, the family would be required to re-apply for the benefits. The parents would have to submit evidence to indicate the child is disabled and eligible for the SSI benefits, instead of simply requesting that they be appointed representative payee. 42 U.S.C. § 1383(p); 20 C.F.R. § 416.1321(b). An SSI application can be a complicated and cumbersome process that some parents are unable or unwilling to complete and, at a minimum, would delay the receipt of benefits.

In making these property limitations a condition for SSI eligibility, Congress made it clear that such benefits are not designed to establish a savings account for individuals to use in the future. Instead, SSI benefits are intended to provide a minimum level of income for a child. 20 C.F.R. § 416.110. By applying a child's SSI benefits toward the costs of foster care, county child welfare agencies are using SSI benefits as specified by both the SSI and the representative payee provisions.

Moreover, the accumulation of social security benefits may also effect the child's eligibility for healthcare through California's Medi-Cal program. Generally, a child in foster care automatically qualifies for healthcare through the Medi-Cal program. 22 C.C.R § 50201 *et seq*. However, a child will not be eligible for foster care funding under AFDC-FC if it has property over $10,000. Cal. Dept. Soc. Srvs. All County Ltr. 02-45 (June 25, 2002). Because Medi-Cal eligibility is linked to receipt of foster care funding, once accumulating this property, a child will no longer be

eligible for healthcare through Medi-Cal. 22 C.C.R. §§ 50203, 50205.

Thus, the consequence of *Keffeler* is that dependent children can become ineligible for the very state and federal programs that are meant to provide for them. The survivor's benefits and SSI payments at issue here are intended to support the current needs of the beneficiaries. Use of these benefits for other purposes, such as investment for undefined "special needs," would likely result in termination of the benefits and ineligibility for other programs. The *amici curiae* accordingly urge the Court to uphold the Administration's fair and reasonable interpretation of the representative payee provisions and allow social security benefits to be used as they were intended – to provide for the current needs of children in foster care.

CONCLUSION

For the foregoing reasons, the Washington Supreme Court's decision in *Guardianship Estate of Danny Keffeler v. Washington State Department of Social and Health Services, et al.* misconstrued the Act and would result in unintended consequences that would harm state and local child welfare agencies and the children that they serve. Accordingly, the *amici curiae* respectfully request the Court to reverse the *Keffeler* decision and to uphold the

Administration's interpretation of the representative payee provisions.

Respectfully submitted,

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Appendix of Federal and State Policies Cited in Brief of *Amici* Counties of California and California State Association of Counties

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STATE OF CALIFORNIA – HEALTH AND WELFARE AGENCY

[SEAL]

DEPARTMENT OF SOCIAL SERVICES
744 P Street, Sacramento, CA 95814

September 30, 1994

REASON FOR THIS TRANSMITTAL
[ ] State Law Change
[ ] Federal Law or Regulation Change
[ ] Court Order or Settlement Agreement
[X] Clarification Requested by One or More Counties
[ ] Initiated by CDSS

ALL-COUNTY LETTER NO. 94-82

TO: ALL COUNTY WELFARE DIRECTORS
ALL CHIEF PROBATION OFFICERS

SUBJECT: TREATMENT OF SUPPLEMENTAL SECURITY INCOME/STATE SUPPLEMENTARY PAYMENT (SSI/SSP) BENEFITS IN THE AID TO FAMILIES WITH DEPENDENT CHILDREN-FOSTER CARE (AFDC-FC) PROGRAM

Reference: ACL 94-42

Supersedes: ACIN I-65-91

The purpose of this All County Letter (ACL) is to provide instruction to counties on the treatment of SSI/SSP benefits in the federal and non-federal AFDC-FC programs.

BACKGROUND

SSI/SSP is a joint federal and state assistance program administered by the Social Security Administration (SSA) for persons who are aged, blind, or disabled and who meet the program's income and resources requirements.

On November 2, 1993, the U.S. Department Of Health And Human Services (DHHS) Administration for Children & Families (ACF) issued Action Transmittal (AT) 93-20 to clarify federal AFDC policy with respect to treatment of retroactive lump sum SSI payments. In addition, on February 4, 1994, the DHHS Administration on Children, Youth and Families (ACYF) issued ACYF Policy Announcement 94-02 which lifted the prohibition on concurrent receipt of Title IV-E Foster Care and Title XVI SSI benefits. These changes in federal policy concerning the treatment of retroactive non-recurring lump sum SSI/SSP benefits and the allowance of concurrent receipt of SSI/SSP and federal foster care benefits have generated numerous county questions.

FEDERAL AFDC-FC

As of February 4, 1994, federal AFDC-FC payments may be made to otherwise eligible children receiving SSI/SSP benefits, and the SSI/SSP benefits are not to be counted as income in the federal AFDC-FC program. Where federal foster care payments are made to an SSI/SSP eligible child the SSA will reduce the SSI/SSP payments on a dollar for dollar basis. When federally eligible AFDC-FC children are dependents and/or wards of the court, the county welfare department (CWD) should become the designated SSI/SSP payee. In those relatively few instances where the federally eligible AFDC-FC child

is not a dependent or ward and serves as their own SSI/SSP payee (i.e., youth age 18 receiving AFDC-FC until graduation) the CWD will disregard SSI/SSP benefits and the SSA will adjust the SSI/SSP payment as noted above. Where the costs of foster care are less than SSI/SSP payment levels, any remaining SSI/SSP benefit is treated as a resource in the following month as noted below in the "Property" section.

NON-FEDERAL AFDC-FC

For children receiving non-federal AFDC-FC benefits, SSI/SSP payments are to be treated as income for foster care eligibility purposes because the SSA will not adjust the SSI/SSP payment as is their practice in federal foster care cases. Again, the CWD should become the designated payee for dependents and wards. Non-federal AFDC-FC benefits may be used to supplement the cost of out-of-home care if the SSI/SSP payment levels do not cover the cost of placement in accordance with existing Eligibility and Assistance Standards (EAS) Manual section 45-302.11. Supplementation of SSI/SSP will non-federal AFDC-FC is only allowed when the following conditions are met:

- The child meets all general and state AFDC-FC eligibility requirements.
- The cost of foster care placement exceeds the amount of the SSI/SSP benefit level.
- The child is not otherwise eligible for federal AFDC-FC benefits.

In those relatively few instances where the non-federally eligible AFDC-FC child is not a dependent or

ward and he/she or a guardian serves as SSI/SSP payee (i.e., youth age 18 receiving AFDC-FC until graduation, or a child living with a non-related legal guardian [NRLG]) the CWD will count the SSI/SSP benefits as income available to the child and supplement as indicated above if the child is eligible and the foster care placement cost exceeds the SSI/SSP benefit. Where the costs of foster care are less than SSI/SSP payment levels, any remaining SSI/SSP benefit becomes the property of the child in the following month and must be treated in accordance with regulation.

SSI/SSP LUMP SUM PAYMENTS IN THE AFDC-FC PROGRAM

As noted above, ACF-AT-93-20 clarifies federal AFDC policy with respect to treatment of lump sum retroactive SSI payments collected during the SSI/SSP retroactive period. This retroactive period is described as the "SSI application processing or determination period, which varies depending on the time it takes to develop a claim." Because the family or recipient may have incurred debts for specialized care during the retroactive period, the policy states that non-recurring lump sum SSI/SSP retroactive payment, "made to an AFDC recipient, shall not be counted as income or a resource for AFDC purposes in the month paid and the next following month."

Therefore, a non-recurring lump sum SSI/SSP retroactive payment made to an AFDC-FC eligible child shall not be counted as income or a resource for AFDC-FC purposes in the month paid and the next following month. After that time all residuals would be considered a resource and treated according to property regulations

referenced below. To ensure equity, this policy will apply to children in both the federal and state AFDC-FC programs.

INTERIM ASSISTANCE REIMBURSEMENT AGREEMENTS

For non-federal AFDC-FC children, counties should attempt to recover any interim assistance paid on behalf of a child who subsequently receives a retroactive SSI/SSP payment by using the Interim Assistance reimbursement (IAR) procedures described in ACL 94-42. If there is a residual after the interim assistance reimbursement process is completed, that remainder is to be treated as property as described above under "SSI/SSP Lump Sum Payments" section. Similarly, where recovery through the IAR process is not possible, the retroactive SSI/SSP payment is to be treated in accordance with the policy described above.

PROPERTY

With the exception of those limits placed on treatment of retroactive SSI/SSP lump sum payments described above, property which is the result of SSI/SSP income accumulation shall be treated in accordance with EAS section 42-201.1; if it is available to the applicant or recipient, it is countable as a resource in determining AFDC-FC eligibility.

ADDITIONAL REQUIREMENTS

EAS section 40-109.2 states that a person or his or her representative who believes the applicant meets the

eligibility requirements for more than one category of aid has the right to choose the type of aid he/she will apply for. Since AFDC-FC and SSI/SSP are both aid programs, the county representative can choose the program that best meets the needs of the foster child. Counties are encouraged to review the circumstances in each case to determine which of several options ensures that county, state and federal funds are expended in the most cost-beneficial manner.

If you have any general questions pertaining to SSI/SSP, they should be directed to the local office of the federal SSA office. Questions regarding the IAR procedures should be referred to the county's IAR Coordinator. For questions pertaining to the AFDC-FC programs, please contact the Foster Care Policy Bureau at (916) 445-0813.

/s/ Marjorie Kelly
MARJORIE KELLY
Deputy Director
Children and Family
Services Division

STATE OF CALIFORNIA – HEALTH
AND HUMAN SERVICES AGENCY

GRAY DAVIS, Governor

[SEAL]

DEPARTMENT OF SOCIAL SERVICES
744 P Street, Sacramento, California 95814

June 25, 2002

REASON FOR THIS TRANSMITTAL
[ ] State Law Change
[ ] Federal Law or Regulation Change
[ ] Court Order
[ ] Clarification Requested by One or More Counties
[X] Initiated by CDSS

ALL-COUNTY LETTER NO. 02-45

TO: ALL COUNTY WELFARE DIRECTORS
ALL CHIEF PROBATION OFFICERS
ALL JUVENILE COURT JUDGES
ALL COUNTY COUNSELS

SUBJECT: **MODIFICATIONS TO THE AID TO FAMILIES WITH DEPENDENT CHILDREN-FOSTER CARE PROGRAM (AFDC-FC)**

SUPERSEDES: ALL COUNTY LETTER 02-29

Recently, the California Department of Social Services (CDSS) submitted an updated Title IV-E State Plan to the U.S. Department of Health and Human Services (DHSS) for approval. During the review process, DHHS identified three areas which required further instructions/clarification from CDSS to the counties.

$10,000 Property Limit

42 United States Code 672 (a) provides that each child in foster care can have up to $10,000 in property regardless of age or participation in the Independent Living Program (ILP). Accordingly, for State and federal AFDC-FC, any child may now retain up to $10,000 in property. For purposes of determining whether the child would have been eligible for AFDC in the petition month as required by Eligibility and Assistance Standards (EAS) Manual 45-202.33, the family may also have up to $10,000 in property and still qualify for AFDC. The $10,000 is in addition to the $1,500 vehicle limit. This increased property limit is effective December 14, 1999.

Transitional Independent Living Plans (TILP)

42 United States Code 675(5)(C) provides, "procedural safeguards will be applied . . . to assure each child in foster care . . . of a permanency hearing to be held, in a family or juvenile court . . . no later than 12 months after the date the child is considered to have entered foster care . . . and not less frequently than every 12 months thereafter . . . which hearing *shall determine . . . in the case of a child who has attained age 16, the services needed to assist the child to make the transition from foster care to independent living . . .*"

This section of federal statute requires that the court consider services available and necessary for the child to transition to adulthood. In accordance with Manual of Policy and Procedures (MPP), Division 31, Sections 31-525.1 through .5, the county social worker must develop a TILP for each eligible youth in placement by the age of 16. Once the appropriate ILP services have been identified,

participation in ILP must become part of a youth's individual needs and services plan and incorporated into the child case plan pursuant to MPP, Section 31-206.37. Pursuant to Welfare and Institutions Code, Section 366.22, the court shall review and consider the social worker's report/case plan and recommendations at each permanency review hearing when making its determination on whether to return the child to their parent or guardian. Accordingly, counties are reminded to include the TILP in the child's case plan when submitting these documents to the court so that it may consider these services at each permanency planning hearing.

Termination of Parental Rights

DHHS has asked the CDSS to clarify how counties determine when to file a termination of parental rights for a child in foster care.

45 Code of Federal Regulations (CFR) 1356-20(i)(1) provides, " . . . the State must file a petition to terminate the parental rights (TPR) of a parent(s):

(i) Whose child has been in foster care under the responsibility of the State for 15 of the most recent 22 months. The petition must be filed by the end of the child's fifteenth month in foster care."

The county must calculate the 15 of 22 months period from the "date the child entered foster care" as defined in Welfare and Institutions Code, Section 361.5(a). For children with multiple foster care placement episodes within the 22 month period, the county must use a cumulative method of calculating 15 months in foster care. However, the 15 month period cannot include trial home visits or runaway episodes.

TPRs need not be filed in the following circumstances [from 45 CFR 1356.21(i)(2)]:

- The child is being cared for by a relative;
- The county has documented a compelling reason for determining that filing a petition for TPR is not in the best interest of the child. Compelling reasons include, but are not limited to; adoption is not an appropriate permanent plan for the child; no grounds to file a TPR exist; the child is an unaccompanied refugee minor; there are foreign policy reasons that would preclude a TPR; or the county has NOT provided reasonable services to reunify the child.

If you have any questions about filing a TPR petition, please contact the Permanency Policy Bureau at (916) 322-4228. If you have questions about eligibility for AFDC-FC benefits or TILPs, please contact the Funding and Transitional Youth Programs Bureau at (916) 324-5809.

Sincerely,

ORIGINAL SIGNED BY

SYLVIA PIZZINI
Deputy Director
Children and Family Services Division

c: CWDA

STANDARDS OF ASSISTANCE
44-102 (Cont.) INCOME Regulations

* * *

44-102 AVAILABILITY OF INCOME 44-102
(Continued)

d. MONTHLY RECURRING UNEARNED GOVERNMENTAL BENEFITS – Monthly benefits (e. g., Social Security benefits, or Veterans benefits, etc.) shall be considered to be available in the month the payment was intended, rather than actually received, when the income meets the following criteria:

1. The receipt date of the income varies because mailing cycles cause two payments to be received in one month and none in the preceding or following month;
2. The source of income is a governmental benefit program; and
3. The income is unearned and recurring.

NOTE: Authority cited: Sections 10553 and 10554, Welfare and Institutions Code. Reference: Section 11157 (Ch. 270, Stats. 1997), Welfare and Institutions Code.

44-103 EXPLORATION OF INCOME POTENTIALS AND INCOME VERIFICATION 44-103

.1 County Responsibility

.11 The county shall:

.111 Review, with the applicant or recipient, all his/her resources to determine income-producing potential.

.112 Determine whether income is actually received and, if so:

(a) The regularity of receipt,

(b) The gross or net amount, as appropriate,

(c) The applicant's or recipient's share, and

(d) Whether the income is excluded or exempt, in whole or in part.

.114 Repealed by Manual Letter No. EAS-93-08, effective 7/1/93.

.115 Repealed by Manual Letter No. EAS-93-08, effective 7/1/93.

.116 Repealed by Manual Letter No. EAS-93-08, effective 7/1/93.

.117 Repealed by Manual Letter No. EAS-93-08, effective 7/1/93.

.118 Repealed by Manual Letter No. EAS-93-08, effective 7/1/93.

.12 The county shall examine income available to the applicant or recipient from the following potential sources:

.121 Social Insurance, i.e., OASDI, Railroad Retirement, Unemployment Insurance, Disability Insurance, etc.

.122 Benefits available to veterans of military service, members of military service, their spouses, and their dependents.

.123 Rights and interests in real and personal property.

.124 Responsible relatives who may be contributing or have a legal liability to contribute.

.125 Other persons who may be contributing.

.126 Recipient's capacity for self-help and employment.

.127 Private pension plans, union welfare funds, life insurance disability benefits, and other forms of assistance.

.2 Applicant and Recipient Responsibility

.21 The applicant or recipient, including the person responsible for the child shall provide information necessary to determine income.

.22 The requirement in Section 44-103.21 is considered to be met on the date of application as long as it is completed by the date of authorization of aid.

.23 The county shall deny or discontinue aid, including immediate need, to the AU when the applicant or recipient fails or refuses to provide information necessary to determine income.

.231 Repealed by Manual Letter No. EAS 93-108, effective 7/1/93.

.24 Repealed by Manual Letter No. EAS 93-108, effective 7/1/93.

.3 Repealed by Manual Letter No. EAS 93-108, effective 7/1/93.

NOTE: Authority cited: Sections 10553, 10554, 10604, and 11209, Welfare and Institutions Code. References: Sections 10553, 10554, 10604,, and 11270, Welfare and

Institutions Code; and 45 CFR 233.10(a)(1) and 233.20(a)(3)(ix).

* * *

SI 00830.410 Foster Care Parents

Citations:

Sections 1612(a)(2) and 1612(b) of the Social Security Act; 20 CFR 416.1102, 416.1103, 416.1120, 416.1121(a), 416.1124(c)(2), and 416.1124(c)(12)

A. DEFINITIONS

1. Foster Care

An individual is considered to be in foster care when:

- a public or private nonprofit agency places the individual under a specific placement program; and
- the placement is in a home or facility which is licensed or otherwise approved by the State to provide care; and
- the placing agency retains responsibility for continuing supervision of the need for such placement and the care provided.

2. Foster Care Payment

For SSI purposes, a foster care payment is a payment made to the foster care provider for the purposes of meeting the needs of the individual in care. (This includes not only the individual's need for food, clothing and shelter but also education, transportation, etc.).

NOTE: An agency may make an additional payment to the foster care provider for his/her own use (e.g., an incentive or service payment not intended to support the child). While these two payments may be combined and termed the "foster care payment" by the issuing agency, only the

part which is provided to meet the needs of the individual in care is the foster care payment for SSI purposes.

B. BACKGROUND

1. Foster Care Payments – General

a. Who Can Receive Foster Care Payments

Foster care payments are provided for both children and adults.

NOTE: The source of the payment might not be the placement agency. Sometimes placement is by one agency and the source of payment is another agency or an individual.

b. Treatment of Foster Care Payments

Treatment of foster care payments depends on the funding source of the payments, the purpose of the payments, and whether the SSI recipient is the provider or recipient of the care.

2. Foster Care Under Title IV-E

a. Administration of Title IV-E Foster Care

At the Federal level, the foster care program authorized by title IV-E of the Social Security Act is administered by the Administration for Children and Families (ACF). Title IV-E provides for Federal matching funds to States for foster care under certain circumstances.

b. Type of Children Placed Under Title IV-E Foster Care

Children who are placed under title IV-E foster care are children who would have been eligible to receive Aid to Families with Dependent Children (AFDC) or Temporary Assistance to Needy Families (TANF) had they not been removed from their homes. These children are categorically eligible for Medicaid.

c. Availability of Title IV-E Funds

Title IV-E funds are available for care in a family home or a private child care institution, or in a public child care institution which accommodates no more than 25 children.

C. POLICY – FOSTER CARE PAYMENTS

1. Title IV-E Foster Care Payments

a. Individual in Care

Foster care payments made under title IV-E (both the Federal amount and State amount) are considered income based on need (IBON) (*SI00830.170*) to the individual in care. This income is not subject to the $20 general exclusion and is not ISM. (See *SI 02005.025* for prospective accounting rules for title IV-E payments.)

EXCEPTION: Section 477 of title IV-E (Independent Living Initiatives) is a program for individuals age 16 or over making the transition from foster care to independent living. Payments made under Section 477 of title IV-E are cash assistance from a governmental social services program and, therefore, are not income (*SI 00815.050*).

b. Foster Care Provider

- Foster care payments (as defined in *SI 00830.410A.2.*) are not income to the provider.
- Amounts paid to a provider of foster care in excess of the foster care payment are income to the provider.

2. Title IV-B or Title XX Foster Care Payments

Foster care payments involving funds provided under title IV-B or title XX of the Social Security Act are social services and are not income.

3. Certain State- or Locally-Funded Foster Care Payments

Foster care payments funded wholly by a State or local government and under a program that uses income as a factor of eligibility are assistance based on need (ABON) (*SI 00830.175*). ABON is excluded from income.

4. Other Foster Care Payments

Foster care payments not described above are subject to the general rules pertaining to income and income exclusions.

NOTE: Assuming the foster care provider gives no cash to the individual in care (*SI 00830.410D.4.*), an individual in foster care whose foster care payment has no Federal funds involved may derive in-kind income but does not derive cash income directly from the foster care payment (*SI 00835.790*).

5. Filing for Other Benefits

An individual is **never required** to file for foster care payments in order to receive SSI.

D. PROCEDURE

1. Title IV-E Foster Care Payments

- Verify the frequency and amount of title IV-E foster care payments (and any amounts paid to the provider in excess of the foster care payments) by using documents in the individual's possession or by contacting the appropriate State agency.
- Follow any regional, State, or local verification procedures.

NOTE: In an initial claim, if countable income, including any title IV-E foster care payments, exceeds the FBR, the claim should be denied for excess income.

2. Title IV-B or Title XX Foster Care Payments

Use documents in the individual's possession, FO or regional precedents, or contact with the agency to verify title IV-B or title XX involvement.

3. Certain State- or Locally-Funded Foster Care Payments

Use documents in the individual's possession, FO or regional precedents, and/or contact with the agency to verify that the assistance is ABON. If so, exclude the payment from income.

4. Other Foster Care Payments

- Assume that the provider of foster care gives no cash to the individual in care, absent evidence to the contrary.
- Keep in mind that an individual whose foster care payment has no Federal funds involved may derive in-kind income but does not derive cash income directly from the foster care payment

  (*SI00830.410C.3.*).
- Determine the nature of the foster care and apply the appropriate rules pertaining to income. Consult any regional instructions on foster care payments.
- Assume that the payment made to the provider of foster care is to meet the needs of the individual in care and, thus, is not income to the provider, absent evidence to the contrary.

5. Foster Care Payments to Providers of Foster Care

- **Verify that the placement meets the definition of foster care in *SI 00830.410A.1.*** Use documents in the individual's possession, field office or regional precedents, or contact with the agency. If a precedent has been established, document the file to show this.

Generally, accept the allegation of the placement agency as to its nonprofit (tax exempt) status without further verification.

NOTE: Determinations of tax exempt status are made by the Internal Revenue Service (IRS), and in a few situations where the status is unknown or questionable, it

should be verified by seeing the agency's tax-exempt IRS letter, or by contacting IRS.

- **Assume that the payment made to the provider is a foster care payment** (i.e., is to meet the needs of the individual in care) and is not income to the provider, unless there is evidence to the contrary.
- **If the provider is an SSI recipient or deemor and evidence indicates a payment includes additional monies above the foster care payment**, verify the purpose(s) of the payment and the amounts involved using documents in the individual's possession, FO or regional precedents, or contact with the agency. Consider any payment in excess of the amount paid to meet the needs of the individual to be income to the care provider.

NOTE: This income is usually unearned income but may be earned income (see *RS 01802.000* for self-employment earnings).

If the care provider is not self-employed and evidence indicates a payment was made for a specific service (e.g., $20 for shopping assistance), accept the care provider's signed allegation of any cost of providing the service (e.g., $5 automobile expense). Deduct the cost from the payment (*SI 00830.100*) and consider the remainder to be unearned income.

E. REFERENCES

- Forms and amounts of income, *SI 00810.020*.
- $20 general income exclusion, *SI 00810.420*.
- Medical and social services, *SI 00815.050*.

- Assistance based on need, *SI 00830.175*.
- Foster care payments made by the Bureau of Indian Affairs, *SI 00830.810*.
- ISM in Non-institutional Care, *SI 00835.790*.

http://policy.ssa.gov/poms.nsf/lnx/0500830410

SI 00830.170 Income Based on Need (IBON)

Citations:

Social Security Act, as amended, sections 1612(a)(2) and 1612(b)(2)(A); 20 CFR 416.1124(c)(12)

A. DEFINITION

Income based on need (IBON) is assistance:

1. provided under a program which uses income as a factor of eligibility; and
2. funded wholly or partially by the Federal government or a nongovernmental agency (e.g., Catholic Charities or the Salvation Army) for the purpose of meeting basic needs (i.e., the funds are provided specifically for a formalized program whose general purpose is similar to that of the SSI program).

EXCEPTION: State supplementary payments (as defined in *SI 01401.001*ff. made to refugees are not IBON (see *SI 00830.175*), despite involvement of Federal funds.

B. POLICY PRINCIPLE

Income based on need is counted as income dollar for dollar, unless it is totally excluded by statute (e.g., food stamps) or excluded under a PASS (*SI 00870.001*ff.). The $20 general income exclusion (*SI00810.420*) does not apply to IBON.

NOTE: If a nongovernmental agency is involved, consider whether the assistance qualifies for exclusion as HEA/SMA (*SI 00830.605*) or meets the definition of a social service (*SI 00815.050*).

C. OPERATING PROCEDURES

NOTE: These instructions apply when there are no separate instructions pertaining specifically to the program in question. Check both national and regional instructions first.

1. Verify with the administering agency personnel and/or program descriptions that the assistance meets the definition of income based on need. A field office precedent established within the preceding year, or a precedent established by regional instructions may be used.

2. Verify the amount of the assistance for each month with the administering agency or through documents in the individual's possession.

3. If income based on need is paid to or on behalf of a group of people, determine one individual's income by the incremental method (i.e., the individual's income is the difference between the amount paid and the amount which would have been paid had the individual not been included).

http://policy.ssa.gov/poms.nsf/lnx/0500830170

ACF
Administration for Children and Families

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
Administration for Children, Youth and Families

1. Log No.: 2. Issuance Date: February 4, 1994 3. Originating Office: Children's Bureau 4. Key Word: Concurrent Eligibility for SSI and Title IV-E Foster Care Payments

POLICY ANNOUNCEMENT

TO: State Administrators of Public Child Welfare Agencies, Directors of Adoption Assistance Programs and Foster Care Programs Under Title IV-E of the Social Security Act

SUBJECT: Title XVI Supplemental Security Income (SSI) and Title IV-E Payments – Concurrent Eligibility for Payments From Title IV-E Foster Care and SSI; Concurrent Eligibility for Payments From Title IV-E Adoption Assistance and SSI. This Policy Announcement Supersedes ACYF-PA-83-05.

LEGAL AND RELATED REFERENCES: Public Law 96-272; Sections 402(a)(24), 408, 470, 472, and 473 of the Social Security Act; ACYF-PA-83-05 dated December 14, 1983, SSA-AT-79-14 dated April 24, 1979, and APA-IM-74-03 dated November 3, 1973; 20 CFR 416.1100ff and 416.1200ff; and PROGRAM OPERATIONS MANUAL SYSTEM, Part 5, Supplemental Security Income Chapter 008 – Income – Subchapter 30-Unearned Income.

BACKGROUND: Several inquiries have been received from the Regional Offices as to whether the current prohibition of concurrent receipt of title IV-E Foster Care Maintenance payments and title XVI Supplemental

Security Income (SSI) payments, as promulgated in Policy Announcement ACYF-PA-83-05, is the only possible interpretation of the Social Security Act and corresponding Federal Regulations. Questioners have noted that concurrent receipt of title IV-E adoption assistance and SSI is allowed.

Public Law 96-272, the Adoption Assistance and Child Welfare Act of 1980, established a new part E under title IV of the Social Security Act (the Act). Part E provides Federal matching funds for the costs of foster care maintenance (formerly provided for under title IV-A of the Act) and adoption assistance payments for certain eligible children.

Eligibility for foster care maintenance under title IV-E (section 472(a)) is based on receipt of or eligibility for Aid to Families with Dependent Children (AFDC) under title IV-A of the Act. Eligibility for adoption assistance (section 473(a)) is based on receipt of or eligibility for AFDC or eligibility for Supplemental Security Income benefits (SSI) as provided under title XVI of the Act.

In response to Regional queries, ACYF has changed its policy to allow concurrent eligibility for payments from SSI and title IV-E foster care, as is already allowed with SSI and title IV-E adoption assistance.

POLICY INTERPRETATION: This Policy Announcement supersedes ACYF-PA-83-05. Concurrent eligibility for payments from either title IV-E foster care maintenance or title IV-E adoption assistance and title XVI (SSI) is permissible.

B. Title IV-E Foster Care

There is no prohibition in title IV-E against claiming FFP for foster care maintenance payments made on behalf of a child who is receiving SSI benefits. Federal matching funds for the costs of foster care maintenance for certain eligible children formerly provided under title IV-A (Section 408) of the Act are now provided under title IV-E foster care (section 472). Although eligibility for title IV-E foster care is tied to eligibility for title IV-A (section 472(a)) and title IV-A precludes concurrent eligibility for payments from title IV-A and title XVI (section 402(a)(24)), this preclusion rule is not transferable to title IV-E for the purposes of foster care maintenance payment eligibility determinations. A child, if eligible, may receive benefits from both programs simultaneously.

D. Title IV-E – Adoption Assistance

There is no prohibition under title IV-E against claiming FFP for adoption assistance for a child who receives benefits from SSI. Section 473 of title IV-E created an adoption assistance program which permits Federal matching funds for the costs of adoption assistance for the purpose of encouraging the placement of eligible children in adoptive homes. Under title IV-E adoption assistance (section 473), the scope of eligibility specifically includes children with special needs who are eligible to receive SSI (473(a)(2)(A)(ii)) as well as those eligible for AFDC (473(a)(2)(A)(i)) and title IV-E foster care (473(a)(2)(A)(iii)).

Title XVI (SSI) is a needs based program and, as such, requires a test of income and resources of the adoptive parents in determining the amount of the

SSI benefit to which a child with a disability(ies) may be entitled. If (or when) the parental resources and income exceed a maximum level determined by the SSI program, the child is no longer eligible for SSI payments. If the adoptive parents decide to decline adoption assistance and choose to receive only SSI for the child, and if they have not executed an adoption assistance agreement before the adoption is finalized, they may not later receive title IV-E adoption assistance payments, as the child would no longer meet all of the eligibility requirements as a child with special needs (section 4739(c)(2)). It may be prudent for the decision maker (parent, guardian, custodian, caretaker relative) to arrange for an adoption assistance agreement which does not provide for payment, but which does provide for title XVI and title XIX coverage, and which may at some future date, upon review, be renegotiated to provide for payment of adoption assistance funds.

As with title IV-E foster care, the adoptive parents of a child eligible for title IV-E adoption assistance and SSI benefits may make application for both programs and the child, if eligible, may benefit from both programs simultaneously.

DISCUSSION In cases where the child is eligible for both SSI and title IV-E and there is concurrent receipt of payments from both programs, "the child's SSI payment will be reduced dollar for dollar without application of any exclusion", thus decreasing the SSI benefit by the amount of the title IV-E payment (SSI Program Operations Manual). To reiterate, concurrent receipt is subject to the SSI rule that the SSI payment will be reduced by the amount of the foster care payment.

ACTION REQUIRED: The difference between title XVI (SSI) and title IV-E should be considered carefully by the decision maker when choosing whether to apply for either or both title IV-E or SSI benefits on behalf of the child. Information regarding the benefits available under each program should be made available by the State title IV-E agency so that an informed choice can be made in the child's best interest. To achieve this goal, title IV-E agencies should exchange information regarding eligibility requirements and benefits with local Social Security district offices and establish formal procedures to refer clients and their representatives to the local Social Security district office for consultation and/or application when appropriate.

EFFECTIVE DATE: Upon Issuance.

INQUIRIES TO:

Regional Administrators, ACF
Olivia Golden
Commissioner
Administration on Children, Youth and Families

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8.4D TITLE IV-E, General Title IV-E Requirements, Concurrent Receipt of Federal Benefits

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What is the Department's policy, under title IV-E, on concurrent receipt of benefits under title IV-E and Supplemental Security Income (SSI)?

How should the decision to apply for SSI or title IV-E benefits be made?

May we claim title IV-E administrative costs for eligible children who receive Supplemental Security Income (SSI)?

Question: What is the Department's policy, under title IV-E, on concurrent receipt of benefits under title IV-E and Supplemental Security Income (SSI)?

Answer: There is no prohibition in title IV-E against claiming Federal financial participation (FFP) for foster care maintenance payments or adoption assistance payments made on behalf of a child who is receiving SSI benefits.

Foster Care: Although eligibility for title IV-E foster care is tied to eligibility for Aid to Families with Dependent Children (AFDC) as was in effect on July 16, 1996 and AFDC precluded concurrent eligibility for payments from AFDC and title XVI (section 402(a)(24) of the Social Security Act), this preclusion rule is not transferable to title IV-E for the purposes of foster care maintenance payment eligibility determinations. A child, if eligible, may receive benefits from both programs simultaneously.

In cases where the child is eligible for both SSI and title IV-E and there is concurrent receipt of payments from both programs, "the child's SSI payment will be reduced dollar for dollar without application of any exclusion", thus decreasing the SSI benefit by the amount of the title IV-E payment (SSI Program Operations Manual). To reiterate, concurrent receipt is subject to the SSI rule that the SSI payment will be reduced by the amount of the foster care payment.

Adoption Assistance: In the Adoption Assistance program, the applicant may choose to apply for either or both SSI and adoption assistance. Concurrent receipt of benefits from the adoption assistance program and SSI is not prohibited under title IV-E (section 473).

Section 473 of title IV-E created an adoption assistance program which permits Federal matching funds for the costs of adoption assistance for the purpose of encouraging the placement of eligible children in adoptive homes. Under title IV-E adoption assistance (section 473), the scope of eligibility includes children with special needs who are eligible to receive SSI as well as those eligible for AFDC and title IV-E foster care. The statute's intention to extend the program of adoption assistance is clearly stated in section 473(a)(1)(A)(ii): "Each State . . . shall . . . make adoption assistance payments . . . to parents . . . who . . . adopt a child who . . . (ii) meets all of the requirements of title XVI with respect to eligibility for supplemental security income benefits. . . ."

The adoptive parents of the child eligible to receive title IV-E adoption assistance payments and SSI benefits may make application for both programs and the child, if eligible, may receive benefits from both programs. In considering the most appropriate choice o [sic]

programs and deciding whether to make application for one or both, the adoptive parents should be aware of the differences between SSI and the Adoption Assistance Program.

Title XVI (SSI) is a needs based program and, as such, requires a test of income and resources of the adoptive parents in determining the amount of the SSI benefit to which a disabled child may be entitled. If (or when) the parental resources and income exceed a maximum level determined by SSI, the child is no longer eligible for SSI payments.

In cases where the income and resources of the adoptive parents do not affect the child's eligibility for SSI and

there is concurrent receipt of payments from both programs, SSI will then count dollar-for-dollar the amount of title IV-E adoption assistance paid to the parents, thus decreasing the SSI benefit by the amount of the adoption assistance payment.

In the Adoption Assistance Program, the amount of the adoption assistance payment is determined after taking into consideration the circumstances of the adopting parents and the needs of the child being adopted. While the child's SSI benefit would be a consideration in the negotiation of the amount of the adoption assistance payment as part of the determination of the needs of the child being adopted, this income would not generate an automatic reduction in any standardized payment amount, as in the SSI program. The amount agreed upon by the adoptive parents and the administering agency is limited, however, to the amount of the foster care maintenance payment which would have been paid if the child had been in a foster family home (section 473(a)(2)).

Because there are many complexities and financial implications for the States as well as the adoptive families, it is important for all parties to discuss all aspects of a combination of SSI and adoption assistance at the time the adoption assistance agreement is negotiated. Such discussions could include, in addition to the adoptive parents, representatives from title IV-E and title XVI programs.

With full knowledge of the SSI and Adoption Assistance programs, the adoptive parents can then make an informed decision about application for or receipt of benefits from either or both programs for which they or the child are eligible. They should be advised, however, that if they decline title IV-E adoption assistance and choose to receive

only SSI for the child, and if they do not execute an adoption assistance agreement before the adoption is finalized and do not receive adoption assistance payments pursuant to such an agreement, they may not later receive title IV-E adoption assistance payments, as the child would no longer meet all of the eligibility requirements as a child with special needs (section 473(c)(2)).

- **Source/Date:** ACYF-CB-PA-94-02 (2/4/94)
- **Legal and Related References:** Social Security Act – sections 402(a)(24), 406(a) and 407 (as in effect on July 16, 1996) and 472(a) and 473(a); Program Operations Manual System, Part 5, Supplemental Security Income Chapter 008 – Income, Subchapter 30 – Unearned Income

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Question: How should the decision to apply for SSI or title IV-E benefits be made?

Answer: The difference between title XVI (SSI) and title IV-E should be considered carefully by the decision maker when choosing whether to apply for either or both title IV-E or SSI benefits on behalf of the child. Information regarding the benefits available under each program should be made available by the State title IV-E agency so that an informed choice can be made in the child's best interest. To achieve this goal, title IV-E agencies should exchange information regarding eligibility requirements and benefits with local Social Security district offices and establish formal procedures to refer clients and their representatives to the local Social Security district office for consultation and/or application when appropriate.

- **Source/Date:** ACYF-CB-PA-94-02 (2/4/94)
- **Legal and Related References:** Social Security Act – titles IV-E and XVI

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Question: May we claim title IV-E administrative costs for eligible children who receive Supplemental Security Income (SSI)?

Answer: Yes. An August 17, 1993 memorandum from the Acting Commissioner of the Administration on Children, Youth, and Families to the Administration for Children and Families Regional Administrators allowed a State to include children who are eligible for title IV-E but who are receiving SSI in lieu of title IV-E foster care maintenance payments when determining its administrative cost ratio. This practice was conceptualized by considering these children candidates for foster care. While the policy itself is sound, a child who is in foster care is not a candidate because s/he has already been removed from home. If a child is fully eligible for title IV-E a State's choice to fund that child's board and care through SSI rather than title IV-E does not negate that child's eligibility for title IV-E. The State may, therefore, claim Federal financial participation under title IV-E for title IV-E administrative functions performed on behalf of that child.

- **Source/Date:** ACYF-CB-PA-01-02 (7/3/01)
- **Legal and Related References:** Social Security Act – sections 471 and 474

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